

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re: :  
X LEGACY, LLC, : Docket #13cv7984  
 : 1:13cv07984-LTS-HBP  
 :  
Plaintiff, :  
 :  
- against - : New York, New York  
 : November 8, 2013  
THIRD WORLD PRESS, INC. :  
 :  
Defendant. :  
----- :

PROCEEDINGS BEFORE  
HONORABLE LAURA T. SWAIN  
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For Plaintiff: MEISTER SEELIG & FEIN, LLP  
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INDEX

E X A M I N A T I O N S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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HONORABLE LAURA T. SWAIN (THE COURT): Good afternoon, please be seated. So we're here on an application for an order to show cause with temporary restraining order in the matter of X Legacy, LLC, against Third World Press, Inc., number 13cv7984. Counsel, would you please state your appearances.

MR. ADAM OPPENHEIM: Adam Oppenheim from Meister Seelig & Fein, on behalf of plaintiff, X Legacy, LLC.

THE COURT: Good afternoon, Mr. Oppenheim. And who is with you here?

MR. OPPENHEIM: This is my associate, Clinton, please introduce yourself.

MR. CLINTON JACKSON: Clinton Jackson of Meister Seelig & Fein.

THE COURT: Good afternoon, Mr. Jackson.

MR. JACKSON: Good afternoon.

THE COURT: Now, has counsel for the defendant been informed of this TRO application?

MR. OPPENHEIM: Yes, they have, Your Honor. We have informed counsel, both by phone where we left a voice message, and emails which we sent to them indicating that we were coming here today, this afternoon to file this. Our intention to file the papers you have before you has also been made clear over the course of the last few weeks

1  
2 in a series of emails and correspondence to the other side,  
3 both in the form of a cease and desist letter and simply in  
4 letters asking them to come to the table to talk to us, all  
5 of which are attached to the papers before the Court at  
6 this time.

7 THE COURT: And would you tell me precisely what  
8 information you provided to counsel for the defendant  
9 regarding this TRO application and when you provided it?

10 MR. OPPENHEIM: Yes, certainly, Your Honor. With  
11 respect to the facts underlying the TRO, that is with  
12 respect to what we've asserted in these papers, that the  
13 property they are seeking to exploit is ours, and ours  
14 alone. That has been the subject of numerous emails sent  
15 beginning on October 23<sup>rd</sup>, which was just a few days after  
16 we first learned of the impending publication of the works  
17 which we believe is going to happen next week.

18 The first time we informed them that we intended  
19 to file today's TRO was earlier today.

20 THE COURT: How much earlier today?

21 MR. OPPENHEIM: About four hours ago, Your Honor.

22 THE COURT: And so you're representing that you  
23 reached out by telephoned and email four hours ago?

24 MR. OPPENHEIM: Yes, that's correct.

25 THE COURT: And what was the substance of your

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message?

MR. OPPENHEIM: We indicated that we would be filing the complaint and seeking preliminary relief before the Court this evening based upon their representation that the book would be released early next week.

THE COURT: And did you specifically say that you would be seeking a temporary restraining order?

MR. OPPENHEIM: Yes, we did, Your Honor.

THE COURT: Restraining publication of the work?

MR. OPPENHEIM: Yes, we did.

THE COURT: Who, who represents the defendant, Third World Legacy?

MR. OPPENHEIM: At this time they have not indicated that they have counsel and we have spoken to a number of representatives at the company, one of whom is an individual named Mr. Bennett Johnson who we understood was the business manager. Mr. Johnson did not, however, provide an answer to our initial request of whether or not they would continue with publication and this was a conversation that happened a few weeks ago. We also spoke, I'm sorry, I don't want to butcher the name, I believe it's Mr. Mudabati (phonetic) --

MR. JACKSON: Madhubuti.

MR. OPPENHEIM: Madhubuti, I'm sorry, Your Honor,

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2 who was referred to us by Bennett Johnson and he also did  
3 not, promised is a response and never gave us one. So when  
4 we reached out to him today, we told him that we had no  
5 choice by to seek the restraining order.

6

THE COURT: Now this Mr. Madhubuti, can you spell  
7 that name for the record?

8

MR. OPPENHEIM: I can do my best, can you help me  
9 out here, I think it's --

10

MR. JACKSON: It's M, as in mother, A-D -- M-A-H-  
11 D-U-B-U-T-I.

12

THE COURT: Okay, M-A-H-D-U-B-T-I?

13

MR. JACKSON: B-U --

14

MR. OPPENHEIM: It actually appears, Your Honor,  
15 in paragraph 10 of the declaration accompanying our order  
16 to show cause, and there it is spelled M-A-D-H-U-B-U-T-I.

17

THE COURT: Okay, and so is this the same person  
18 who purportedly wrote the forward of this book?

19

MR. OPPENHEIM: Yes. Yes, it is, Your Honor.

20

THE COURT: Because I see that name on the cover  
21 of the book. I thought I understood you a minute ago to  
22 say that you had informed both the entity and its counsel,  
23 did mishear you?

24

MR. OPPENHEIM: Yes, I'm sorry, Your Honor. As I  
25 said earlier, we don't believe that they have counsel at

1  
2 this time. We were actually, that was our first question  
3 back on the 23<sup>rd</sup>, they have never told us they were  
4 represented by counsel and we have had, we have attempted  
5 to have a number of discussions with both Mr. Johnson and  
6 Mr. Madhubuti about the release of this book and they have  
7 not directed us to counsel at any time.

8 THE COURT: Your proposed order to show cause with  
9 temporary restraining order calls for service on the  
10 defendant, on TWP or its counsel by hand delivery or  
11 prepaid overnight courier. And you say to TWP's principal  
12 business address.

13 MR. OPPENHEIM: Yes.

14 THE COURT: Is, what is its principal business  
15 address?

16 MR. OPPENHEIM: This is alleged in the complaint  
17 upon information and belief, and it's also information that  
18 was defined from their website, principal business address,  
19 it's 7822 South Dobson Avenue in Chicago, Illinois.

20 THE COURT: And the numbers that you've been using  
21 to speak to Messrs. or attempt to speak to Messrs. Johnson  
22 and Madhubuti, are those Chicago numbers? I'm trying to  
23 figure out how meaningful and effective the communications  
24 have been thus far for purposes of the, whether this is an  
25 ex parte TRO application effectively or not. And also for

1  
2 purposes of service. So that's the point of the questions,  
3 I may not be asking exactly the right questions, but if you  
4 can respond to the substance of that inquiry.

5 MR. OPPENHEIM: I understand, Your Honor. The  
6 numbers that we have for them are, in fact, Chicago  
7 numbers, and I'm sorry to say that I, the frustration we  
8 have felt in getting in touch with Third World Press is  
9 unfortunately something I guess I'm passing onto the Court.  
10 We have been able to get people on the phone and we sent  
11 countless emails, each one of which is attached to our  
12 papers, we just simply don't get calls back. Now we know  
13 the number we have is good, we know we were reaching out to  
14 Third World Press, and we have had communications with  
15 employees of Third World Press, but what we are not getting  
16 is anyone responsive to either our cease and desist or our  
17 instructions to join issue with us on this. We're just not  
18 getting anything back from them and we were very specific  
19 today when we spoke to them and explaining that because of  
20 that we had no choice but to seek preliminary relief  
21 because the book is supposed to come out in just a few  
22 days.

23 THE COURT: And did you tell them where you were  
24 coming to make this application?

25 MR. OPPENHEIM: Yes, we did, Your Honor.



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THE COURT: What precisely did you tell them?

MR. OPPENHEIM: We said the Southern District, at the time we didn't know what judge we'd be assigned. So we indicated this court.

THE COURT: What's the basis for believing that this Court has personal jurisdiction?

MR. OPPENHEIM: The publication company has already started distributing the unauthorized book in New York, we actually obtained a copy of it, we also believe that they improperly obtained a copy of the diary pages they are seeking to publish from the Schomburg Center of the New York Public Library in upper Manhattan. Because the torts that the defendant has committed would affect New York and because we believe some of those torts may in fact have been, some of that tortuous conduct may have been committed in New York, and because this is a publishing company that regularly does business in New York, we believe this Court has personal jurisdiction over the defendant.

THE COURT: And so as you can imagine, I only had a limited opportunity to review the papers so this advanced, uncorrected copy is, that's depicted in your Exhibit H, and that's referred to in the complaint, is a work that was purportedly prepared by the defendant entity,

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it's not that the estate, that X Legacy had prepared the book and sent it out for review?

MR. OPPENHEIM: No. No, Your Honor, not at all. In fact, one of the complicating factors here for us personally, I don't think this is before the Court, but X Legacy is planning and has always been planning to release The Diaries of Malcolm X on or about the 50<sup>th</sup> anniversary of his assassination. Because the book isn't quite done yet we hadn't raced to register the copyright. We have now done so upon finding out that someone else entirely was improperly trying to publish and profit from those same pages of the same diary. That property all belongs to X Legacy which is the Legacy LLC set up by the heirs of Malcolm X precisely to protect this intellectual property and other property of the estate of Malcolm X and Betty Shabazz from exploitation by anyone else.

THE COURT: And in your, in the affidavit and I think in the complaint there is a representation that the Shabazz daughters have assigned their rights to X Legacy, is it your representation that those individuals are the only individuals who would have had rights in the diaries or --

MR. OPPENHEIM: Yes, yes, it is, Your Honor, that is entirely my understanding, that is entirely consistent

1  
2 with what my understanding has been to date is that they  
3 are the only ones who hold this and they assigned whatever  
4 they had inherited from the estate to this LLC precisely to  
5 prevent the unilateral decision by anyone who got a copy of  
6 something and thought they had a right to publish it.  
7 That's why the LLC was created and that's why it held this  
8 material.

9 THE COURT: And it's also your representation that  
10 this Third World Press has no rights in the diaries from X  
11 Legacy or anybody else?

12 MR. OPPENHEIM: They do not have any rights from X  
13 Legacy, they have, there are representations on their  
14 website that we're confused by, and it's something we're  
15 hoping to get to the bottom of, but X Legacy is the holder  
16 of these rights and X Legacy has never given permission to  
17 anyone else. So it's not entirely clear to us what the  
18 source of Third World Press's assertion of the right to  
19 publish this material comes from. And, of course, that's  
20 precisely the question we've been asking of them for the  
21 last two or three weeks.

22 THE COURT: And what is the nature of the  
23 representation on their website?

24 MR. OPPENHEIM: The representation indicates that  
25 something like together with the children of Malcolm X,

1  
2 who, of course, are the members of X Legacy, that they have  
3 been given the right to publish this material. And, of  
4 course, we have the assignment because we represent X  
5 Legacy, showing that the children, in fact, assigned their  
6 interest to the LLC. And so we do not know what the basis  
7 for that representation is.

8           If there is an agreement with, with Third World  
9 Press, we would certainly take the position that that  
10 agreement is void because it would be a promise to give  
11 away something that whoever promised didn't have, because  
12 that property has always been explicitly the property of X  
13 Legacy.

14           THE COURT: Now that I've asked you all sorts of  
15 specific questions, would you make your application in  
16 summary form with your factual and legal basis for the  
17 record?

18           MR. OPPENHEIM: Absolutely, Your Honor. And my  
19 apologies if any of this is redundant in our discussions to  
20 date. But I think you've probably already heard most of  
21 what matters here. X Legacy, LLC, was set up, as I  
22 indicated earlier, to protect the property of the Estate of  
23 Malcolm X and his wife. To create X Legacy, LLC, one of  
24 the steps that was taken was the children of Malcolm X  
25 established the LLC, and assigned their rights into

1  
2 anything that came out of the estate. And so it mentions in  
3 that assignment as you'll see, writings, photographs,  
4 anything that belonged to the estate did now sort of come  
5 into these hands.

6           What X Legacy did with that material was to give  
7 it on a very confidential basis to the Schomburg Center of  
8 the New York Public Library, where it was to some extent  
9 able to be reviewed by scholars, but not photocopied or  
10 distributed at any time. And at around that time, X Legacy  
11 began developing a plan for what they saw as the best  
12 possible way to exploit and disseminate these works to the  
13 world. Their plan was that these were things that would be  
14 released upon the 50<sup>th</sup> anniversary of Malcolm X's  
15 assassination.

16           Only a few weeks ago they heard that somebody else  
17 in Chicago had copies of the diary somehow and was planning  
18 on releasing them. Because these diaries had never been  
19 outside of the control of either the family or the  
20 Schomburg Center, they immediately took steps to contact  
21 Third World Press which began an internet based fundraising  
22 campaign to support the publication of these works. And we  
23 obtained a copy of the advanced copy that you see  
24 photocopied in the exhibits, and attempted to try actually  
25 to just work this out. To say, you know, everyone here

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wants these diaries published, but you don't have the right to do that and we have a very good idea of how we would like to do that.

The members of X Legacy, LLC, have always had a very carefully thought out plan for how best to present these materials to the world. I think the parties all recognize the importance of these works. I don't think anyone at Third World Press really has a different opinion on the importance of what's out there, but the fact of the matter is they were not anyone's to give away and Third World Press is taking advantage of the family of Malcolm X's right to release these materials as they see fit, saw fit, and they have a good idea about how they'd like to do that.

So beginning on about October 23<sup>rd</sup>, as I had mentioned, we attempted to reach Third World Press to ask them to stop the publication of the book, to at least work out a way that maybe the parties could work together to find an agreeable way to distribute these works, that at least took into consideration the plans of the people who, in fact, held the rights to publish them, but we didn't get anything. We got no responses, we got some run around, some people said call Bennett, some people said call Dr. Madhubuti, and it was very frustrating and when we finally

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made it clear that we were going to seek the relief of the Court, we stopped getting any response to either voice messages or to emails. Again, all of the email correspondence we've sent was attached to our papers.

To turn to the legal basis for our motion before the Court, I think the irreparable harm element, although it is usually listed second, is rather obvious in this instance. The ability to release the so far unpublished writings of Malcolm X can only happen once. Once these diaries are out to the world, the ability, not only to market them successfully, but to present them in the way that the holders of the copyrights intended, is lost. This is a classic example where somebody is basically stealing our book out from underneath our feet. And I think the damages here have very little to do with the financial gain sought by the company -- sorry, sought by the LLC, but rather everything to do with their right to choose the manner in which the diaries of Malcolm X are presented to the world.

X Legacy is the only entity with the right to do that as it should be, it's the children of Malcolm X, you are choosing together how to present these works to the world, that shouldn't be taken away from them. If it is taken away from them there is almost no way they can get

1  
2 the toothpaste back in the tube, the children of Malcolm X  
3 will never be able to choose again how it is to present to  
4 the world these very special diaries.

5           As far as likelihood of success on the merits  
6 goes, as I indicated earlier, the X Legacy, LLC, has  
7 immediately and as quickly as possible, applied for  
8 registration and pre-registration of both the underlying  
9 diaries as well as the unpublished book that the children  
10 of Malcolm X would release containing the diaries in a few  
11 years. That is tentatively titled The Diaries of Malcolm  
12 X. We have rushed to establish that although normally the  
13 pre-registration process is not evidence of the ownership  
14 of the copyright, it is sufficient at this stage to allow  
15 us to bring the underlying claims and to seek this  
16 immediate relief from the Court. And for that reason I  
17 think that, and I do want to stress again the immediacy and  
18 irreparable nature of the harm at issue here, I think the  
19 only safe route is to at least put the breaks on this  
20 infringing activity until at worst the facts can be sorted  
21 out appropriately. I think we've presented material to the  
22 Court which establishes that we do hold the copyright to  
23 these works and that no one else does. And at the very  
24 least, to allow a hearing on that to determine how this  
25 comes out, because if we don't, this book comes out on



1  
2 Tuesday, and the story is over. We can be aggrieved, we  
3 can sue, we can do whatever we want, but we will never  
4 again have the opportunity to choose how these works are  
5 presented to the world. That will be gone early next week  
6 is our understanding.

7 THE COURT: Thank you. Would you be seated for a  
8 moment and I'll reflect on this.

9 MR. OPPENHEIM: Sure.

10 THE COURT: I find, based on the papers submitted  
11 and the representation of counsel, that the likelihood of  
12 success on the merits and balance of hardship in favor of  
13 plaintiff has been shown sufficient to warrant the issuance  
14 of the order to show cause, including the temporary  
15 restraining order and that the requisite risk of  
16 irreparable harm in the absence of temporary relief has  
17 been established based on the representations that this is  
18 a heretofore unpublished work and that the plaintiff has  
19 exclusive rights in the work and has also sufficiently  
20 commenced the copyright registration process to support  
21 enforcement of the copyright through litigation.

22 I have marked up the proposed order to refer in  
23 the first paragraph, in addition to the representation of  
24 Adam B. Oppenheim, Esq., that he provided advance oral  
25 notice of this application for an order to show cause and

1  
2 TRO to representatives of defendant. I have set this show  
3 cause hearing for two weeks from today, that is November  
4 22<sup>nd</sup> at nine in the morning in this courthouse. I am  
5 initialing the TRO paragraph. I am requiring the posting  
6 of security in the amount of \$5,000 to be posted by next  
7 Wednesday, the 13<sup>th</sup> of November, and ordering that  
8 responsive papers be filed with the Court and served upon  
9 plaintiff's counsel by, with a courtesy copy delivered to  
10 the Court per chambers, by three o'clock on the 18<sup>th</sup> of  
11 November, which is a week Monday with reply papers to be  
12 served and filed by three o'clock on November 20<sup>th</sup>, which is  
13 a week from next Wednesday. And I am requiring service by  
14 nine in the morning on Tuesday, the 12<sup>th</sup> of November, and I  
15 have indicated that I have issued this order at 5:10 p.m.  
16 on today, November 8<sup>th</sup>.

17           So my law clerk will make a Xerox copy of the  
18 order and give it you and you will, we will file the order,  
19 you will have to file the supporting papers and you can use  
20 the copy for service.

21           MR. OPPENHEIM: Okay, great.

22           THE COURT: Are there any questions?

23           MR. OPPENHEIM: No, thank you very much, Your  
24 Honor, I appreciate your attention to this and late on a  
25 Friday on a holiday weekend. I appreciate it very much.

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MR. JACKSON: Thank you, Your Honor.

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THE COURT: Thank you.

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(Whereupon the matter is adjourned.)

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C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, X Legacy, LLC versus Third World Press, Inc., Docket #13cv7984, was prepared using digital electronic transcription equipment and is a true and accurate record of the proceedings.

Signature\_\_\_\_\_

Date: December 17, 2013